Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-2018.

IN THE

Supreme Court of the United States

October Term 1980.

PETER L. MAROULIS,

Petitioner,

v.

COUNTY COURT OF THE COUNTY OF DUTCHESS and HONORABLE ALBERT M. ROSENBLATT, Individually and as a Judge of the Dutchess County Court,

Respondents.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION.

BRIEF OF RESPONDENT IN OPPOSITION.

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BRIEF OF RESPONDENT IN OPPOSITION.

Statement of the Case.

Albert Fentress has been indicted for the murder of Paul Masters (*see* Pet. App. 37a)* and is now awaiting trial in the County Court of Dutchess County on that indictment.

By Order, dated June 30, 1980, the New York State Supreme Court Appellate Division, Second Judicial Department, stayed that criminal action pending determination of this proceeding.

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*(Pet. App.) refers to the appendix to the petition.
(S. Tr.) refers to the stenographic transcript of the November 21, 1979, hearing in the Dutchess County Court.
(S.T.R. [a]) refers to the stenographic transcript of the November 27, 1979, hearing in the Dutchess County Court.

Prior to trial, defendant Fentress sought dismissal of the indictment, contending in part, that it was the product of inadmissible, tainted evidence which had been obtained in violation of the attorney-client privilege, as codified in New York Civil Practice Law and Rules, 4503. Defendant Fentress also argued that this evidence was not competent because it was obtained in violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. A pre-trial hearing was held to resolve the factual dispute concerning the circumstances under which the police learned of the homicide.

Wallace Schwartz, an attorney, received a telephone call from his friend and former teacher (Pet. App. 7a) Albert Fentress, who lived in Poughkeepsie (Dutchess County), New York, at approximately 2:00 a.m. on August 20, 1979. When Wallace Schwartz had graduated from law school, he joined a civil firm in New York City; he had given Fentress his card and had told him that he could call any time (Pet. App. 7a). At the time Schwartz received the telephone call, he was in bed in his residence in Hartsdale (Westchester County), New York. Fentress told Schwartz that he was going to kill himself. When asked why, he replied that he killed somebody, that a terrible thing had happened and that Fentress would be unable to square this thing with God. Fentress indicated that this was not an accidental killing; there had been a sexual mutilation (Pet. App. 7a). He appeared to be distressed. Schwartz suggested that Fentress come to his home, but Fentress refused because of the distance between Poughkeepsie and Hartsdale. After suggesting the names of several people who might go to Fentress' home (S. Tr. 96-99), Schwartz ". . . asked him if I could call the Rabbi and have the Rabbi come over . . . would he wait there for me." Fentress indicated that he: ". . . would leave the door open for the Rabbi,—that the Rabbi can come over and that he would wait for the Rabbi, and at that time I, meaning me

[Wallace Schwartz] could call the police" (S. Tr. 99; Pet. App. 7a). At that point, Schwartz told Fentress that he would terminate the conversation and telephone the Rabbi (S. Tr. 96-100) (Albert Fentress was and is not Jewish. The only connection between Fentress and the Rabbi was that they had both been at Wallace Schwartz' wedding [Pet. App. note accompanying text at 8a]).

Fentress and Wallace Schwartz had talked for approximately thirty (30) minutes. During that conversation, Schwartz' only "legal" advice to Fentress was that the police should be called (S. Tr. 158; Pet. App. 8a). Fentress agreed but wanted the Rabbi present when the police arrived (Pet. App. 8a).

Schwartz then telephoned his parents for the purpose of enlisting their aid in contacting the Rabbi (S. Tr. 111-12). Albert Fentress and Enid Schwartz had been friends and teaching colleagues for more than ten years (Pet. App. 6a). Mrs. Schwartz suggested to her son

> . . . that she telephone Al before calling the Rabbi. I [Wallace Schwartz] said that would be a good idea because in doing that we would know for certain that we were dealing with a real situation.

(S. Tr. 111-12.) Although Wallace Schwartz had not mentioned to Fentress that he was going to telephone his mother, at Mrs Schwartz' suggestion, Wallace Schwartz agreed that his mother should call Mr. Fentress in order to verify that Fentress had a problem (Pet. App. 10a).

According to Mrs. Schwartz, during that five minute conversation with her son, Wallace Schwartz seemed to be upset (S. Tr. 14-16). At approximately 2:45 a.m., at the conclusion of the mother/son conversation, Mrs. Schwartz telephoned Mr. Fentress. When she asked what

had happened, he replied ". . . there was a killing or a shooting" (S. Tr. 21; Pet. App. 10a). He asked if she would call Rabbi Zimmet to have him come to the Fentress residence (S. Tr. 22). Mrs. Schwartz suggested that the police be called, and Fentress responded that he would like to have Rabbi Zimmet with him waiting until the police came (S. Tr. 79; Pet. App. 10a). Upon the conclusion of that conversation, Mrs. Schwartz attempted on two occasions, unsuccessfully, to telephonically contact Rabbi Zimmet. She was afraid to inform Fentress of her failure because she thought he might carry out his suicide threat, so she decided to advise the police to protect Fentress' well-being. Mrs. Schwartz telephoned her son Wallace at approximately 3:00 a.m. and he agreed that the police should be called immediately because he, too, was afraid that Fentress might commit suicide (S. Tr. 83; S. Tr. 126-27; Pet. App. 11a).

Wallace Schwartz told his mother to:

> . . . call the police. I indicated to her at that time that I thought, just before she hung up, I said I think that there may be an attorney-client problem here; and that in what you relate to the police, you should indicate that Al Fentress is contemplating suicide, and that something very serious has happened there and you should indicate that somebody has been killed in the house (S. Tr. 126-27; *see* Pet. App. 11a).

In addition to his concern that Fentress was contemplating suicide, Mr. Schwartz was also concerned for the safety of the police officers who might be entering the residence (S. Tr. 127-28).

Wallace Schwartz never notified Fentress of the decision to call the police even though Schwartz' understanding

with Fentress was that the police would not be contacted until after Schwartz arrived at the Fentress home (S. Tr. 179-84).

At approximately 3:00 a.m., Dispatcher, Patrolman Thomas Ghee of the City of Poughkeepsie Police Department, received a telephone call at police headquarters from Enid Schwartz of 28 Bancroft Road in the City of Poughkeepsie. Mrs. Schwartz requested that the police dispatch officers to the home of Albert Fentress at 216 Grand Avenue because there might have been a "killing" or "shooting" at that location. She told the police that she had spoken with Mr. Fentress and that he said that "there . . . had been a killing or a shooting . . . ." She also advised the police that she was fearful that Albert Fentress would harm himself and she apprised the officers of her attempts to contact Rabbi Zimmet because Fentress "wanted him there while he waited for the police." Mrs. Schwartz also told the police not to use their sirens because she wanted no harm to come to Fentress and "if anything was going on" (S. Tr. 35), "she did not want any harm to come to a policeman." She offered to accompany the police and told the officer that Fentress had a gun collection. The police declined Mrs. Schwartz' offer to accompany them; officers were dispatched to the Fentress home (Pet. App. 12a). During her conversation with the police, Mrs. Schwartz made no reference to the fact that her son was an attorney (S. Tr. [a] 24). Indeed, she never mentioned the word attorney (S. Tr. [a] 6).

As a result of Mrs. Schwartz' conversation with Patrolman Ghee at 3:05 a.m., Patrolman Robert Holden, Robert Matushik, Thomas Perkins and Ronald Ross were dispatched to 216 Grand Avenue. As three of the officers approached the front door of the home, it was noted that the door was open, the lights were on inside and Albert Fentress was sitting in the southwest corner of the house

near an open window. Prior to the police entering the residence, Mr. Fentress asked the officers to enter—"come in and take the gun" (S. Tr. 70-74; S. Tr. [a] 59; Pet. App. 12a). He was thereafter approached by the police and disarmed. At approximately 3:19 a.m., Officer Perkins gave the defendant the "Miranda Warnings" at which point Mr. Fentress indicated that he had already contacted his attorney, who lived in Hartsdale, New York (S. Tr. 63; Pet. App. 12a). Shortly after his arrest, while traveling to the police station, Mr. Fentress identified the attorney as Wallace Schwartz (S. Tr. 64; Pet. App. 12a). Between the time Mr. Fentress arrived at police headquarters at approximately 3:40 a.m. until 6:00 a.m., he made several requests concerning the whereabouts of his attorney (S. Tr. 66; S. Tr. [a] 67; Pet. App. 12a-13a).

One of these requests was made to Detective Ira S. Siegel at approximately 4:25 a.m. Pursuant to the defendant's request, Detective Siegel telephoned the Schwartz residence on Bancroft Road in the City of Poughkeepsie and spoke with Mrs. Enid Schwartz. He was told that her son was en route from Westchester County and would arrive in Poughkeepsie at approximately 5:30 a.m. (S. Tr. 92-93; Pet. App. 13a). Upon his arrival in Poughkeepsie, Wallace Schwartz telephoned the police. He spoke with Detective Siegel approximately five to ten minutes after Siegel had telephoned Mrs. Schwartz. Mr. Schwartz told the detective ". . . he didn't feel that he could defend Fentress because he is not a criminal attorney." During this conversation, Mr. Fentress was seated in the room with Detective Siegel. Siegel related to Fentress that Schwartz would not represent him. Mr. Schwartz then inquired if Mr. Fentress had mentioned any other attorney. Mr. Fentress had mentioned the name of Peter L. Maroulis and the detective advised Mr. Schwartz of that information (S. Tr. 102-04; Pet. App. 13a).

Wallace Schwartz suggested that Mr. Maroulis be contacted. He did not intend to personally represent Fentress

in connection with this crime. "I am a real estate attorney. I don't have any background in criminal law" (S. Tr. 139-40; S. Tr. [a] 102). However, prior to the arrest, Mr. Schwartz had not told Fentress that he would or would not be representing him in this matter (Pet. App. 13a).

At 5:30 a.m. on August 20, 1979, Detective Siegel received a telephone call from Peter L. Maroulis, an attorney, instructing him not to speak with Fentress (S. Tr. 104; Pet. App. 13a).

Wallace Schwartz met with Mr. Maroulis and accompanied him to the police station where they both interviewed Fentress at approximately 6:00 a.m. Mr. Schwartz was also present at the arraignment of Fentress in the City Court of the City of Poughkeepsie. At 1:30 that afternoon, at the County Jail, Mr. Schwartz informed Fentress that he would not be handling his criminal case (S. Tr. 142-46). He did this even though he never told Fentress he would represent him in the criminal action (S. Tr. 151).

At the conclusion of the pre-trial hearing, after making findings of fact and conclusions of law, Respondent Rosenblatt denied Fentress' motion to dismiss the indictment (Pet. App. 1a-31a).

Subsequently, attorney Maroulis, on behalf of his client, brought on a proceeding in the New York State Supreme Court Appellate Division, Second Judicial Department seeking to prohibit the Respondents from trying Albert Fentress on this indictment on the ground that the indictment was not based on legally sufficient evidence.[1] The Appellate Division dismissed the pro-

[1]Pursuant to an agreement between New York State Assistant Attorney General Barbara B. Butler and Dutchess County Assistant District Attorney Thomas J. Dolan, the District Attorney of Dutchess County has represented the Respondents in this proceeding.

ceeding and the Court of Appeals of the State of New York denied leave to appeal.

Reasons Why the Writ Should be Denied.

Petitioner is seeking an extraordinary writ to obtain interlocutory review of a pre-trial order in a state criminal proceeding. The Respondents recognize that the issue of whether a breach of confidence by a defendant's own attorney requires the application of an exclusionary rule presents a novel issue (*see* Pet. App. 2A). The Respondents also recognize that this Court has the power and the authority to issue this type of writ (*Ex Parte Fahey,* 332 U.S. 258, 259-60 [1947]), but here, its use is inappropriate.

Petitioner has not established a right to the writ because he has not established that based on the facts developed at the hearing, the County Court lacks jurisdiction to try this Indictment. *Kerr v. United States District Court for the Northern District of California,* 426 U.S. 394, 402 (1976); *Bankers Life Casualty Company v. Holland,* 346 U.S. 379, 383-84 (1953); *Ex Parte Bakelite Corp.,* 279 U.S. 438, 461 (1929).

In the first question which petitioner asks this Court to review, he assumes that there has been a violation of the attorney/client privilege. However, this presumption is in direct conflict with the findings of fact made by Respondent Rosenblatt at the conclusion of the pretrial hearing.

The attorney/client privilege applies:

> *(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6)*

are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 *Wigmore On Evidence,* Section 2292, *McNaughton* Rev. 1961. (Emphasis original.) Although the County Court found that defendant Fentress communicated with attorney Schwartz for the purpose of seeking legal advice (Pet. App. 17A-18A), the only legal advice which he received was that the police should be notified (Pet. App. 18A-20A). Fentress agreed that the police were to be notified (Pet. App. 20A-23A). Therefore, the client Fentress decided that the portion of his attorney/client communication pertaining to the corpus of the crime was not to remain confidential. While hindsight may indicate to the defendant that another course of conduct might have been more beneficial to him, that alone does not demonstrate that there was an unauthorized disclosure of a confidential communication. Since the client did not intend to have the communication remain confidential, the disclosure to the police did not violate the attorney's ethical obligation. *See In re Grand Jury Investigation of Ocean Transportation,* 604 F. 2d 672, 675 (D. C. Cir.), *cert. denied,* U.S. , 100 S. Ct. 229 (1979).

Similarly, when Albert Fentress made his statements to Enid Schwartz concerning the shooting, there was no indication that he intended them to be confidential or to remain confidential. Although Mrs. Schwartz telephoned defendant Fentress shortly after he had spoken with Wallace Schwartz, there was nothing in her inquiry concerning what had happened which indicated that she knew the nature of what had occurred. Albert Fentress made admissions to her. Finally, he also agreed with Mrs. Schwartz that the police should be notified. Thus, he confirmed his intention not to keep the fact of the homicide a secret. *See United States v. Franklin,* 598 F. 2d 954 (5th Cir.), *cert. denied,* U.S. , 100 S. Ct. 147 (1979).

It was also appropriate for the police to be notified because Albert Fentress was threatening to kill himself. Both Enid and Wallace Schwartz were concerned about Fentress's life. Mrs. Schwartz expressed that concern to the police when she notified them. In New York State Bar Opinion 486 (1978) (New York State Bar Journal, August 1978), the question: "May a lawyer disclose his client's expressed intention to commit suicide?" was answered affirmatively. Although suicide is no longer a crime in New York State, the opinion is consistent with the value that society places on human life and the general principle that an attorney may disclose an intent to commit a future crime. *See* generally *McCormick, Evidence, Second Edition,* 199-201.

At page 14 of his petition, petitioner refers to this Court's decisions in *Black v. United States,* 385 U.S. 26 (1966); and *O'Brien v. United States,* 386 U.S. 345 (1967). These cases involved the Government monitoring or intercepting conversations between a criminal defendant and his attorney. Here, however, neither the police nor agents of the police were intruders (*see generally United States v. Zarzour,* 432 F. 2d 1 [5th Cir. 1970]); the police were the passive recipients of information disclosed by a private citizen.

The language of the Sixth Amendment to the United States Constitution does not contain an exclusionary requirement. Although this Court has found that the violation of a defendant's Sixth Amendment right caused by police misconduct may require suppression of evidence, the petitioner has not demonstrated that those rulings should be extended to this situation. The petitioner is effectively seeking to suppress the corpus of a crime. Since the discovery of the homicide cannot be attributed to misconduct on the part of law enforcement officers, the

information concerning the occurrence of the homicide and information flowing from that disclosure should not be suppressed.

At pages 15 and 16 petitioner argues that he will suffer irreparable injury if forced to trial on this indictment. In many respects Albert Fentress is in the same position as any criminal defendant who is required to proceed to trial before obtaining appellate review of an adverse pretrial ruling on his motion to suppress a confession, identification, evidence or physical evidence. The arguments which he presents would generally apply to any defendant in New York State whose pretrial suppression motions are denied and who intends to interpose a defense of insanity. However, since he has not established that the respondent usurped its power by denying the pretrial motion to dismiss the Indictment, he has failed to establish a right to the extraordinary relief requested.

CONCLUSION.

The petition for a writ of prohibition should be denied.

June 17, 1980.

Respectfully submitted,

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